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January 29, 2008

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

SUPPLEMENTAL REPORT REGARDING MEASURES TO AMEND THE CITY CHARTER

**INTRODUCTION**

On January 14, 2008, the City Council directed the City Attorney to prepare draft language for ballot measures to amend the City Charter and to submit to voters in June 2008. The Council discussed nine matters raised in a January 11, 2008 memorandum from Council President Scott Peters, Council President Pro Tem Jim Madaffer, and Councilmember Kevin Faulconer. The memorandum incorporated nine of eleven recommendations from the Final Report of the Charter Review Committee (CRC), with certain modifications.

The Council is scheduled to discuss the measures on February 4, 2008. We previously raised concerns about certain language proposed by the CRC in the City Attorney Report to Council RC-2008-1 (Jan. 14, 2007). This supplemental report includes the language this Office recommends be used to achieve the Council's goals. We recommend four measures that combine related matters in compliance with the Separate Vote Rule, and explain material changes from phrasing that had been suggested by the CRC or the Council.

**DISCUSSION**

**I. Compliance with the Separate Vote Rule.**

The City Council expressed a desire that the nine matters it discussed on January 14, 2008 be consolidated and presented to voters in two measures. Mindful of the Separate Vote Rule, however, this Office has concluded that the nine matters under consideration are better submitted to voters in four measures.

We recently explained the Separate Vote Rule is a limitation on a legislature's power to submit constitutional amendments to the voters. *See City Att'y Rept. to Council RC 2007-17* (Nov. 2, 2007); *Californians for an Open Primary v. McPherson*, 38 Cal. 4th 735 (2006). The rule requires that all the proposed changes submitted in one measure must be "reasonably germane" to each other. "Germane" means "closely related" or "relevant." Webster's New Universal Unabridged Dictionary 767 (2nd ed. 1979).

January 29, 2008

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

The importance of complying with the Separate Vote Rule was explained by the Court in *McPherson*. Violations of the Rule can result in a pre-election court order that bars submission of the matter to the voters, or post-election invalidation of a measure improperly submitted to the voters in a single package. The lower court in *McPherson* had entertained a preelection challenge, and had then ordered that the two measures it found improperly joined be severed and presented to the voters separately. The California Supreme Court expressly disapproved the pre-election challenge remedy of bifurcation, holding that "bifurcation is not a remedy for violation of the separate-vote provision. . . ." *McPherson*, 38 Cal. 4th at 782. This means that if the City Council were to improperly combine measures, and that action was successfully challenged in court before the election, the combined measure could not be submitted to voters at all.

The Council has indicated a desire to act as expeditiously as possible to enact the charter changes that will permit greater financial responsibility and clarity in the roles of City financial officers. This Office advises a cautious approach to compliance with the Separate Vote Rule in order to avoid any delay in submitting those reforms to the voters.

The four measures this Office recommends are:

1. A measure to require the Council to place before voters on the June 2010 ballot a single measure to decide the permanency of Article XV, the creation of a ninth Council district, and an increase in the number of Council votes required to override a mayoral veto.
2. A measure that permits greater fiscal responsibility by creating a separate Office of the Independent Budget Analyst (IBA) to advise the City Council; separating responsibilities for the accounting and auditing functions of the City into two separate officers- a Chief Financial Officer (CFO) and City Auditor; creating an Audit Committee to oversee the City Auditor; and expressly requiring the City budget be balanced.
3. A measure to exempt the services provided by City police officers, firefighters and lifeguards from the Managed Competition process permitted by section 117.
4. A measure to change the way the salaries of elected officials are established.

**II. Amending Charter Section 255 to require a vote on the permanency of a Mayor-Council form of government and related issues on the June 2010 ballot.**

On January 14, 2008, the Council indicated that a ninth Council seat should be linked to the permanency of the Mayor-Council form of government, and the increase in the number of veto-override votes should be linked to the creation of that district. In June 2010, those and other

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

changes related to the Mayor-Council form of government could be enacted in a single, although lengthy, measure.

The Council also suggested that Charter sections 28 and 270 be amended to clarify the role of the IBA, and to authorize creation of that Office even in the absence of Article XV. Instead, this Office suggests that a separate section be enacted in conjunction with the creation of other City fiscal officers. This would permit Council establishment of the IBA as a separate City office, setting out certain minimal qualifications and duties for the Office currently now found in section 270 and portions of the Municipal Code. (See below.)

**III. Financial Responsibility Measure.**

This measure includes sections designed to increase the City's financial responsibility, such as permitting the Council to establish an Office of the Independent Budget (IBA) to advise the Council; separating the City's accounting and auditing functions into two separate offices- a Chief Financial Officer (CFO) and City Auditor; creating an Audit Committee to oversee the City Auditor, independent of other City fiscal management; removing the need for Council confirmation of the City Treasurer; and expressly requiring the City budget be balanced.

**A. Chief Financial Officer.**

The establishment of this office involves amendment of section 39 to change the name of the Office of Auditor and Comptroller to the CFO and to transfer to this office the bulk of the Charter responsibilities previously held by the Auditor and Comptroller.

Related changes include adding the CFO (and IBA and new City Auditor) to the list of officers in the unclassified service by amending section 117 (a)(7); deleting section 265(b)(10) as duplicative; and modifying section 265 (b)(11) to remove references to section 39 and the Auditor and Comptroller for the duration of Article XV. This last change removes from the CFO the right of appeal upon dismissal formerly held by the Auditor and Comptroller. It is consistent with the new structure that separates the former single office into two offices, with the CFO under the authority of the City Manager (Mayor), and the City Auditor under the authority of the new Audit Committee and City Council.

This Office has replaced use of the title "Chief Financial Officers" suggested by the CRC in the sentence midway through section 39 with the more generic term "chief municipal fiscal officers" to ensure duties imposed on other municipal fiscal officers are imposed upon this City's CFO.

The CRC's proposed change to section 45 to remove the need for Council confirmation of the City Manager's (Mayor's) appointment of City Treasurer is included without change.

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

**B. Audit Committee**

This proposal adds section 39.1, creating an Audit Committee to oversee the City Auditor and audit functions of the City as suggested by the CRC. This version deletes the City Attorney as a member of the screening committee as the Council requested. It addresses legal concerns raised in our January 14, 2008 report by incorporating the following changes to the proposed section for the Council's consideration:

- To ensure the Council, not the screening committee, controls the appointment of the public members of the Audit Committee, the draft sets a suggested minimum number of five candidates as the pool from which the Council must select the three public members of the Audit Committee, and establishes that the City Council appoint the public members of the screening committee as follows: "The three (3) public members of the Audit Committee shall be appointed by the City Council from a pool of at least five (5) candidates to be recommended by a majority vote of a screening committee comprised of a member of the City Council, the Chief Financial Officer, the Independent Budget Analyst and two (2) outside financial experts appointed by the City Council."
- This draft modifies the CRC's proposed language in section 39.1 to avoid conflict with section 39 as follows: "The Audit Committee shall have oversight responsibility regarding the City's ~~accounting~~, auditing, internal controls and any other financial or business practices required of this Committee by this Charter ~~or City ordinance.~~"
- The CRC intended that the Council have the authority to impose additional duties and responsibilities upon the Audit Committee by ordinance, as proposed at page 78 of its final report. The proposed last sentence of the new section provided: "The Council shall specify the powers and duties of the Audit Committee." Instead, we have included the following new language which more closely mirrors the intent of the CRC and avoids potential future conflicts. "The Council may specify additional responsibilities and duties of the Audit Committee by ordinance as necessary to carry into effect the provisions of this section."
- As section 39.1 is phrased, the Audit Committee only recommends the Auditor's salary and budget, but does not set that salary or budget. Accordingly, we have deleted the legally unnecessary sentence from section 39.1 that provides: "~~This section shall not be subject to the provisions of section 11.1.~~"

**C. City Auditor**

This proposal adds section 39.2, creating the Office of City Auditor, and amends section 111 to clarify that responsibilities of the Auditor and Comptroller to annually audit the accounts of City Departments, and to investigate and audit the accounts of City officers who die, resign or are removed, are transferred to the City Auditor. The language proposed by the CRC regarding

January 29, 2008

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

the termination of the City Auditor has been modified to reflect the Council's motion. The section 111 changes also permit the Audit Committee to audit the accounts of the City Auditor upon his or her death, removal or resignation. The measure includes the Council request that the Auditor comply with Government Audit standards; other changes to section 39.2 to address the legal issues mentioned in our January 14, 2009 report; and provides the City Auditor with investigatory authority like that provided to the CFO.

Addressing the Council's request that the City Auditor have control over the appointment and dismissal of subordinates, we have provided the Auditor with appointing authority. Section 30 provides the Auditor with removal authority. In addition, we have amended section 117(a)(11) to include as unclassified employees of the City generically described staff of the City Auditor.

- This measure adds language to section 39.2 to provide investigatory authority to the City Auditor like that provided the CFO under section 82 as follows: "The City Auditor shall have access to, and authority to examine any and all records, documents, systems and files of the City and/or other property of any City department, office or agency, whether created by the Charter or otherwise. It is the duty of any officer, employee or agent of the City having control of such records to permit access to, and examination thereof, upon the request of the City Auditor or his or her authorized representative. It is also the duty of any such officer, employee or agent to fully cooperate with the City Auditor, and to make full disclosure of all pertinent information. The City Auditor may investigate any material claim of financial fraud, waste or impropriety within any City Department and for that purpose may summon before him any officer, agent or employee of the City, any claimant or other person, and examine him upon oath or affirmation relative thereto."
- Upon the City Council's motion, the following modifications have been made to the CRC's recommended language for section 39.2:

The City Auditor shall be appointed by the City Manager, in consultation with the Audit Committee, and confirmed by the Council. The City Auditor shall be a certified public accountant or certified internal auditor. The City Auditor shall serve for a term of ten years. The City Auditor shall report to and be accountable to the Audit Committee. Upon the recommendation of the Audit Committee, the City Auditor may be removed for cause by a vote of four-fifths two-thirds of the members of the Audit Committee subject to the right of the City Auditor to appeal to the Council to overturn the Audit Committee's decision. Any such appeal must be filed with the City Clerk within 10 calendar days of receiving the notice of dismissal or termination from the Audit Committee. The City Clerk shall thereafter cause the appeal to be docketed at a regular open meeting of the Council no later than 30 days after the appeal is filed with the Clerk. The Council may override the decision of the Audit Committee to remove the City Auditor by a vote of six members of the Council. The City Auditor shall be the appointing authority of all City personnel authorized in the department through the

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

normal annual budget and appropriation process of the City, and subject to the Civil Service provisions of this Charter.

- For the reasons given in our January 14, 2008 report, we have deleted the legally irrelevant and misleading sentence at the end of the first paragraph in the CRC's proposed section 39.2 that provides: ~~"Nothing herein prevents the Council or the Audit Committee from meeting in closed session to discuss matters that are required by law to be discussed in closed session pursuant to State law."~~
- Because these proposed sections do not involve setting compensation, enacting legislation, or setting City policy, they need not be exempted from section 11.1, and the sentences should be deleted in the CRC versions of proposed section 39.2 *and* amended section 111 that provide ~~"This section shall not be subject to the provisions of section 11.1."~~
- The change to section 117(a)(11) would provide: "(11) Industrial Coordinator All assistants and deputies to the Independent Budget Analyst; all assistants and deputies to the City Auditor."

**D. Independent Budget Analyst**

This measure adds new section 39.3 to the Charter that permits the Council to establish by ordinance a new City Office of Independent Budget Analyst independent of the permanency of Article XV. It is intended to supersede the decision in *Hubbard v. City of San Diego*, 55 Cal. App. 3d 380 (1976). Section 39.3 clarifies the duties of the Office, and incorporates some eligibility requirements for the Office currently found in the Municipal Code. See SDMC § 22.23003. We recommend repeal of what would be a duplicative section 270(f) (and renumbering the rest of that section) in conjunction with the addition of section 39.3.

As with the City Auditor, the section gives the IBA appointing authority. Section 30 provides the IBA with removal authority. In addition, we have amended section 117(a)(11) to include as unclassified employees of the City generically described staff of the IBA. *See* report section III (D) above for language.

The new section 39.3 that we recommend provides:

**Section 39.3. Independent Budget Analyst.**

Notwithstanding any other provision of this Charter, the City Council shall have the right to establish by ordinance an Office of Independent Budget Analyst to be managed and controlled by the Independent Budget Analyst. The Office of the Independent Budget Analyst shall provide budgetary and policy analysis for the City Council. The Council shall appoint the Independent Budget Analyst, who shall serve at the pleasure of the Council and may be removed from office by the Council at any time. Any person serving as the Independent Budget Analyst shall have the

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

professional qualifications of a college degree in finance, economics, business, or other relevant field of study or relevant professional certification. In addition, such appointee shall have experience in the area of municipal finance or substantially similar equivalent experience. The Independent Budget Analyst shall be the appointing authority of all City personnel authorized in the department through the normal annual budget and appropriation process of the City, and subject to the Civil Service provisions of this Charter.

**E. Balanced Budget**

This measure also amends section 69 to require the City to enact a balanced budget and revised budgets throughout the fiscal year. In response to concerns raised in our January 14, 2008 report and Council's request, this version provides the Council with authority to adopt its alternatives to any proposed budgetary revisions submitted by the City Manager (Mayor). As we suggested in our January 14, 2008 report, the need for this change to the Charter is unclear in light of the section's existing language that requires the budget summary "to show the balanced relations between the total proposed expenditures and the total anticipated income and other means of financing the budget for the ensuing year," and other rules requiring municipal budgets be balanced.

However, if the amendment is to be submitted to the voters, we conclude it would be reasonably germane to the other changes proposed in *this* broad measure, which addresses a number of methods for the City to improve its fiscal responsibility. Council members suggested the change to section 69 could be joined with the measure changing how the salaries of elected officials are to be established. But that proposal (see below) removes Council discretion in setting such salaries and does not appear relevant to matters in this measure.

- We revise the suggested CRC language for section 69 to ensure the Council may adopt its alternates to any proposed revised budget as follows: "No longer than 60 days from the date of submittal by the Manager of said revised budget to the Council, the Council shall adopt the proposed revisions or itseffer alternative revisions to ensure the budget is balanced."
- We also revise the final proposed new sentence of section 69 to include posting of any budget revisions as follows: "The City shall post copies of the budget and any revisions on appropriate electronic media, such as the internet, to allow the public full access to the document."

As phrased, there is still a question whether the process established with the changes to section 69 was intended to apply to *every* proposed modification of the budget or amendment to the appropriation ordinance, or only to major budget revisions that might impact a number of departments, such as a mid-year adjustment. Because the section uses words such as "revisions to the budget" and "revised budget," we may assume the intent of this new paragraph is to encompass significant budget revisions arising out of insufficient funding for the City's

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

operations. It is unclear whether a court would agree with that assessment. We also note that use of the word "budget" in the proposed new paragraph implies any proposed budget revisions would be subject to the "back and forth" provisions of the special veto process described in Charter section 290(b), for so long as Article XV is effective.

Last, if Council decides to submit the change to section 69 to the voters we also recommend section 290 (b)(2)(B) be amended to replace the reference to section 71 with section 69 as follows:

(2) If modified by the Council, the budget shall be returned to the Mayor as soon as practicable.

(A) The Mayor shall, within five business days of receipt either approve, veto, or modify any line item approved by the Council.

(B) The Council shall thereafter have five business days within which to override any vetoes or modifications made by the Mayor pursuant to section 290(b)(2)(A). Any item in the proposed budget that was vetoed or otherwise modified by the Mayor shall remain as vetoed or modified unless overridden by the vote of at least five members of the Council a two-thirds vote of the Council as set forth in Section 285. In voting to override the actions of the Mayor, the Council may adopt either an amount it had previously approved or an amount in between the amount originally approved by the Council and the amount approved by the Mayor, subject to the balanced budget requirements set forth in section ~~71~~69.

**IV. Exemption from Managed Competition.**

The Council has recommended the CRC's proposal to ensure services provided by City employees who are members of the City's safety retirement system are not subject to the Managed Competition process. The CRC's proposal adds subsection (d) to section 117 and mirrors language found in the Municipal Code. *See* SDMC § 22.3702(b). Because only City services are subject to Managed Competition, we suggest changes to the proposed language to reflect that, and to amend section 117(c) to include the exemption. These modifications from those previously approved for the Municipal Code may possibly subject the proposal to "meet and confer" requirements. This proposed change is unrelated to any other proposed measure and must be submitted separately to the voters. Our January 14, 2008 report also notes the lack of legal necessity for this Charter amendment so long as the Municipal Code provides this exemption.

Our proposal to amend section 117(c) would add to it this language, showing the variance with the language proposed by the CRC: "The City services provided by ~~P~~police officers, firefighters, and lifeguards who participate in the City's Safety Retirement System shall not be subject to Managed Competition."



REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

**V. Setting the Salary of Elected Officials**

On January 14, 2008, the Council indicated its desire to submit the CRC proposals that the future salaries of all elected officials be set by a reconstituted Salary Setting Commission. The Council suggested deletion of the requirement the Council adopt an ordinance, yet still subject the salaries to the referendum process. Our report of January 14, 2008 provides some background for the CRC's suggestions and proposed an additional amendment to section 280 that we have incorporated into this version of the measure for the Council's approval. *See City Att'y Report RC 2008-1 (January 14, 2008)*. In addition, we deleted the reference to the Mayor in section 12.1; set the appointment date for commission members in section 41.1 at March 1 to more easily accommodate section 12.1's reporting date of February 15; and retained the current requirement that the City Council, consistent with its budget approval authority, provide the necessary funding for the Commission instead of the City Manager as recommended by the CRC.

The Council's request to delete the requirement the Council adopt the ordinance setting the salaries the Commission sets for elected officials, yet retain the referendum process for the decision, is problematic. In pertinent part, the Charter reserves the referendum process *only* to "any ordinance passed by the Council." § 23. There is another section (5.1) that crafted a process that is subject to referendum without adoption of an ordinance. The CRC did not consider that process, and this Office has not had adequate time to study whether it could be a successful model for a salary setting process. Accordingly, the version of this measure submitted for approval retains the requirement Council adopt an ordinance. The measure's language gives the Council no discretion in the process. It *requires* the Council to adopt an ordinance establishing the salaries set by the Commission. It delegates the Council's entire authority and discretion in setting the salaries of elected officials, including their own, to this appointed Commission, exempting the process from the Charter limitations of section 11.1.

This measure does not appear to have the same urgency as the fiscal responsibility measure. A delay in submission of the matter would allow the Council and this Office to review alternatives that were not considered by the CRC related to a change in the process of setting the salaries of elected officials.

We have carefully considered the Council's request that this measure and the amendment to section 69 (requiring the City to propose a balanced budget) be submitted to the voters in a single measure. We do not see how changes requiring a balanced budget for the City are reasonably germane to changes delegating to an appointed body the Council's authority to set the salaries of elected officials. We conclude that submitting both items together would violate the Separate Vote Rule and recommend against such action.

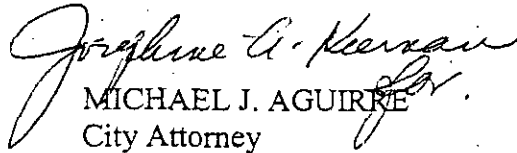
January 29, 2008

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

**CONCLUSION**

We await further direction from the Council regarding these measures and are ready to answer related questions at the February 4, 2008 hearing.

Respectfully submitted,

  
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January 14, 2008

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

CHARTER AMENDMENTS PROPOSED BY THE CHARTER REVIEW  
COMMITTEE FINAL REPORT DATED OCTOBER 4, 2007

**INTRODUCTION**

This report highlights legal issues for the City Council to consider in its discussion of the 11 recommendations of the Charter Review Committee [Committee] for the 2008 ballot.<sup>1</sup> This Office attended many of the Committee's meetings and provided general legal guidance on matters that raised significant legal problems. However, the decision was made to postpone a detailed and thorough analysis of any proposed Charter amendment language until after the Council decided which measures it intended to place on the ballot. This decision was necessary due to the broad range of issues reviewed by the Committee's three subcommittees in a relatively short time period and the uncertainty as to whether the amendments would be approved by the full Committee and Council.

The Council should consider the following matters as it reviews the Committee's recommended Charter amendments:

(1) The legal requirement that ballot measures submitted to voters must comply with the Separate Vote (Single Subject) Rule. See City Attorney's Report to the Rules Committee (November 2, 2007).

(2) The timing of some of the proposed Charter amendments is interdependent upon the passage of others. For example, if voters fail to approve a measure making "permanent" the Mayor-Council form of government, other provisions would not make legal sense as currently phrased. The Council may wish to consider deliberate sequencing of proposals for voter review.

(3) The phrasing of some proposed amendments is vague or conflicts with other Charter provisions not considered by the Committee; some sections may be legally unnecessary; and some fail to address necessary matters.

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<sup>1</sup> This report does not address the 17 items reviewed by the Committee for later ballots or for which no changes were recommended.

## DISCUSSION

The Committee's report separates the proposed amendments into three categories: (1) interim strong mayor and legislative tightening; (2) financial reform and the Kroll report; and (3) duties of elected officials. This report follows the same format.

### INTERIM STRONG MAYOR AND LEGISLATIVE TIGHTENING

#### 1. Sunset Clause Revision for the Mayor-Council Form of Government

Charter section 255 currently provides that the Mayor-Council form of government will be in effect for five years, until December 31, 2010, at which point it will be "automatically repealed and removed from the Charter." The Committee proposes the following change:

##### **Section 255: Operative Date; Future Action by Voters**

This Article shall remain in effect until December 31, 2014, at which time it *shall become permanent* unless voters have approved a ballot measure to extend, shorten or repeal the effective period of this Article. (emphasis added.)

The Committee Report states that this provision "extends the trial period" of Charter Article XV. Committee Report at 8, 11 and 46. This is inaccurate. By removing the sunset provision, the trial period will cease to exist. This amendment would make the Mayor-Council form of government as "permanent" as any other Charter provisions, unless the City Council or the voters pro-actively initiate future ballot measures to change the Article. If the Council chooses to submit the Committee's recommendation to the voters, the measure as presented must not be misleading or false. See, Cal. Elect. Code § 9295, *Martinez v. Superior Court*, 142 Cal. App. 4th 1245, 1248 (2006). In that regard, the ballot materials must more accurately reflect that the change does not extend the trial period but makes "permanent" the Mayor-Council form of government.

#### 2. Increased Votes for Veto Override

Charter sections 285 (Enactment Over Veto) and 290 (Council Consideration of Salary Ordinance and Budget; Special Veto Power) currently require the City Council to reconsider any ordinance or resolution the Mayor has vetoed. The City Council may overrule the veto with the same number of votes it took to enact the legislation. These Charter sections fall within Article XV, and will sunset with it at the end of 2010 unless the voters determine otherwise.

*Number of Votes to Override Mayoral Veto.* The Committee proposes amendments to Charter sections 285 and 290 to increase the number of votes required to override a mayoral veto to "two-thirds" of the Council or, if a two-thirds vote is required for passage, then the veto override requires one vote more than the number of votes required to pass the ordinance or

resolution. The report and text of the proposed changes refer to this as a "two-thirds" Council majority. Committee Report pp. 8, 12-13 and 47.

If the Council decides to submit the Committee's recommendation, it may only do so if it accurately describes the ballot measure. With a continuing eight-member City Council, the Independent Budget Analyst [IBA] calculates the percentage of Council votes necessary to override a veto as *three-fourths* for regular ordinances and resolutions and, in certain matters it, *could surpass 85%*, far greater than an actual two-thirds vote. If the Council desires this to be placed before voters, it must provide a more accurate description of the actual percentages involved.

The increased veto override provisions may be sufficiently related to the permanency of the Mayor-Council form of government to be placed together on the same ballot measure without violating the separate vote rule. However, if the permanency of Article XV is not submitted to the voters with this veto override provision, the Council should assess the need to submit it to the voters before the end of the trial period in 2010. If the Council declines to place permanency of the Mayor-Council form of government on the ballot, the proposed changes to section 285 and 290 should be submitted separately from other recommended changes (except as noted below) to comply with the Separate Vote Rule.

*Reference to the Balanced Budget Requirement.* The Committee's amendment to section 290(b)(2)(B) also includes the following change: "In voting to override the actions of the Mayor, the Council may adopt either an amount it had previously approved or an amount in between the amount originally approved by the Council and the amount approved by the Mayor, subject to the balanced budget requirements set forth in section 7469." Charter section 71 (Preparation and Passage of Annual Appropriation Ordinance) does not specifically require a balanced budget. As noted in the Committee Report, balanced budget requirements are referred to or implied in various other sections of the Charter, including Charter section 69. See Committee Report, p. 19. Accordingly, the reference to Charter section 69 is more appropriate.

The Committee Report also suggests section 69 (Fiscal Year and Manager's Estimate) be amended to include a more specific balanced budget requirement. Report pp. 9 and 60-61. The proposed changes to section 69 may or may not be submitted to the voters, or accepted by the voters. Established accounting principles require the City budget to be balanced, as may other state laws. If this amendment is to be submitted to the voters, a better practice may be to use a more generic phrase, as an example, "... and the amount approved by the Mayor, subject to the balanced budget requirements ~~set forth in section 69.~~"

### **3. Eleven-Member City Council**

Section 270(a) (The Council) currently provides that the Council is composed of eight members. Section 255(b) provides that the people "reserve the right . . . to consider increasing the number of Council districts to *nine* at the time of the next City Council district

reapportionment which follows the national decennial census in 2010." (emphasis added.)  
Section 270 is found in Article XV, and will sunset if and when the article does.

The Committee proposal would amend *only* Charter section 270 as follows: "(a) The Council shall be composed of ~~eight~~eleven councilmembers elected by district, and shall be the legislative body of the City. . . . ¶ (i) The City shall be redistricted, as soon as practicable, to establish the additional districts required by this section. Such redistricting process shall follow the terms prescribed by Charter sections 5 and 5.1." Committee Report, pp. 8, 14 and 49.

The Committee's recommendation for an odd number of Council districts is prompted in part by the desire to avoid Council tie votes during the operative period of Article XV. However, mandating that the redistricting process for the increased number of districts follow Charter section 5 is problematic. Section 5 *requires* the process to occur *after* the next Decennial Census (2010), and to be completed within nine months of the receipt of the census results. Although the redistricting process for eleven districts might be completed by the end of December, that date coincides with the sunset provisions of Article XV. If Article XV sunsets, so will section 270 and the authorization for eleven districts. The Charter would then revert to its previous requirement of eight Council districts, with the Mayor again a member of the City Council, creating an odd number of votes (9).

If Article XV and section 270 do not sunset, and there is a need to increase the number of Council districts, it is also unclear whether the Committee's proposed change to section 270 would legally accomplish this, at least without corresponding changes to other Charter provisions. For example, the following Charter sections could be impacted: section 4 (refers to eight districts); section 5.1 (requires redistricting based on eight districts by numbers 1 to 8); section 10 (lists individual districts and dates for elections); section 12 (provides dates for each district's elections); and section 270(c) (states the number of Council votes needed for a majority). Any serious attempt to increase the number of City Council districts should include corresponding changes to other interrelated Charter sections.

It is theoretically possible under the Separate Vote Rule that this change could be submitted to voters in one measure with other proposed changes to Article XV. However, as indicated above, it is unlikely this single change would actually accomplish this goal. We recommend any increase in the number of City Council districts be considered separately by the voters after the Mayor-Council form of government has been made permanent, and incorporate corresponding changes to related Charter sections.

#### **4. Independent Budget Analyst**

This measure would amend Section 270 (The Council), subdivision (f), to clarify that the Office of the Independent Budget Analyst is authorized under the Charter to act as a budgetary and policy analyst for the City Council. Committee Report, pp. 8, 15 and 50. The Council provided this authorization when it established the Office by ordinance and codified the

provisions in the San Diego Municipal Code. SDMC §§ 22.2301 - 22.2306. Whether the Committee's proposed change to section 270(f) could be combined with other measures, or must be submitted separately to the voters, will depend on whether other matters related to the Mayor-Council form of government are also submitted to the voters.

## **FINANCIAL REFORM AND THE KROLL REPORT**

The Committee's proposals in recommendations 5 (Chief Financial Officer), 6 (Audit Committee) and 7 (City Auditor) separate the City's accounting and internal auditing functions, both functions currently handled by the Office of Auditor and Comptroller (Section 39). Under these proposals, the accounting function would be served by a new Chief Financial Officer. The CFO would have supervisory powers over the Treasurer and certain other financial and accounting functions. The internal auditing function would be handled by a new City Auditor, an office supervised and directed by a new City Audit Committee. We address legal aspects of each recommendation separately. However, the general changes suggested in these recommendations do appear reasonably germane to each other and could be presented together in one measure for voter approval.<sup>2</sup>

### **5. Chief Financial Officer**

Recommendation 5 proposes amendments to Charter sections 39, 45, 117, and 265, briefly summarized as follows:

Section 39 (City Auditor and Comptroller) changes the title of the Auditor and Comptroller to the Chief Financial Officer [CFO]; provides that Office with oversight over treasury and other city fiscal functions; and provides that it assume other duties previously required of the Auditor and Comptroller.

Section 45 (City Treasurer) removes City Council confirmation authority for the appointment of the City Treasurer, whether by the Mayor or City Manager (if Article XV sunsets).

Section 117 (Unclassified and Classified Services) replaces the City Budget Officer with the Chief Financial Officer in the listing of unclassified positions in the service of the City.

Section 265 (b)(10) (The Mayor) makes the corresponding title change to permit the Mayor to appoint the CFO for the duration of Article XV. Committee Report, pp. 8, 15-16 and 51-54.

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<sup>2</sup> The City Attorney has proposed the City Auditor and Comptroller be changed to an elected office with specified duties and responsibilities, and without a separation of the functions of the two offices, or creation of an Audit Committee.

The Committee's proposed amendments to section 39 raise the following issues:

- The proposed section 39 provides in part, "He or she shall perform the duties imposed upon ~~City Auditors and Comptrollers~~ Chief Financial Officers by the laws of the State of California . . . ." This language is unclear. By using a title that may not be used in certain laws of California, the proposed change could fail to impose on this City's Chief Financial officer duties imposed on other municipal fiscal officers. We suggest replacement of the title with a more generic phrase such as: He or she shall perform the duties imposed upon chief municipal fiscal officers ~~City Auditors and Comptrollers~~ by the laws of the State of California . . . ."
- Proposed section 39 includes a new phrase: "The authority, power and responsibilities conferred upon the Auditor and Comptroller by this Charter shall be transferred to, assumed, and carried out by the Chief Financial Officer." This is paraphrased from section 260(b), which gave the broad powers previously exercised by the City Manager to the Mayor under Article XV. It will transfer the accounting duties and investigatory authority held by the Auditor and Comptroller under Charter sections 70, 71, 71a, 72, 73, 74, 75, 77, 80, 83, 84, 86, 87, 88, 89, 110, 112, 126, 144 to the CFO. The Council may wish to consider providing investigatory authority like that found in Charter section 82 to the proposed new City Auditor, the office charged with auditing the CFO and all other City Departments.
- Proposed section 39 provides that the CFO "shall also be responsible for oversight of the City's financial management, treasury, risk management and debt management functions." This language could be problematic because it may conflict with similar "oversight responsibility" provided to the new Audit Committee in proposed section 39.1. See Item 6, below.

## 6. Audit Committee

The Committee's proposal adds new section 39.1 (Audit Committee) to the Charter to create a five-member Audit Committee and to establish its authority and duties. Three members of the public would serve four-year terms and be appointed by the City Council from a pool of candidates who meet certain requirements, as recommended by a "screening committee."<sup>3</sup> The remaining two members of the Audit Committee would be City Councilmembers appointed by the Council, one whom would chair of the committee. The Committee would direct and review the work of the City Auditor, recommend the salary of the City Auditor, and recommend the budget for the office to the City Council. The Committee would also recommend to the Council the retention of the City's outside auditor, and the auditor's removal if appropriate. It would resolve all disputes between City management and the outside auditor related to the City's

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<sup>3</sup> The six-member screening committee is composed of four designated public officers and two "outside financial experts."



financial reports, reporting the disputes to the Council. Additional duties would be established by ordinance.<sup>4</sup> Committee Report, pp. 8-9, 16-17 and 55-56.

If the City Council desires to submit the Committee's recommendation for ballot review, it should be aware that much of the section is vague and raises many unanswered questions. For example, the "screening committee" is tasked with creating a pool of nominees from which the Council appoints the three public members. This results in the screening committee sharing the appointment authority with the City Council. *See Gillespie v. San Francisco Public Library Comm'n*, 67 Cal. App. 4th 1163, 1173 (1998). Yet, there is no mention how the two "outside financial experts" of the screening committee are to be selected. Also, are the experts serving on the screening committee eligible to be in the pool of candidates? Should the Council member of the screening committee also be a member of the Audit Committee, or should those Council Committee members be excluded from serving on the screening committee? Should the section establish staggered terms for the initial terms of the public members to ensure continuity, such as terms of two, three and four years? Should the section set a minimum number of pool members from which the Council selects the three public members? Absent such minimum, the screening committee could send a pool of only three candidates, resulting in the screening committee, rather than the Council, controlling the appointment process.

Proposed section 39.1 also provides: "The Audit Committee shall have oversight responsibility regarding the City's *accounting*, auditing, internal controls and *any other financial or business practices* required by this Charter or City ordinance." (emphasis added.) This language appears overly broad and may conflict in part with the CFO's oversight responsibilities established under proposed section 39.<sup>5</sup> We suggest modifying the language as follows: "The Audit Committee shall have oversight responsibility regarding the City's *accounting*, auditing, internal controls and *any other financial or business practices* required of this Committee by this Charter ~~or City ordinance~~."

Last, section 39.1 provides, "This section shall not be subject to the provisions of section 11.1."<sup>6</sup> However, as proposed, the Committee only "recommends" the Auditor's salary and budget. It does not *set* that salary. There appears to be no legal necessity to exempt section 39.1 provisions from section 11.1 limitations. Accordingly, this sentence may be deleted.

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<sup>4</sup> The creation of this committee by Charter amendment alleviates certain concerns expressed in City Att'y Report No. 2006-25 (Sept. 1, 2006) at pages 4-5.

<sup>5</sup> To the extent this language was intended to provide *access* to all City records and departments to facilitate an audit function, that authority is provided in section 39.2 directly to the City Auditor, who is tasked with this function.

<sup>6</sup> Section 11.1 in part precludes the City Council from delegating its legislative authority to raise or spend money (including setting salaries).

## 7. City Auditor

The Committee's proposal adds new section 39.2 (Office of the City Auditor) to the Charter to establish the office of City Auditor, and amends section 111 (Audit of Accounts of Officers). Under section 39.2, the City Auditor would be appointed for a term of ten years by the City Manager in consultation with the Audit Committee. The City Auditor would report and be accountable to the Audit Committee. The Audit Committee may remove the Auditor with a four-fifths vote, subject to appeal to the City Council. This section also provides the Auditor with access to the records of all City departments, offices and agencies. The changes to section 111 clarify that certain former responsibilities of the Auditor and Comptroller are to be transferred to the City Auditor, namely those that annually audit the accounts of City Departments, and that investigate and audit the accounts of City officers who die, resign or are removed. The section 111 changes also permit the Audit Committee to audit the accounts of the City Auditor upon his or her death, removal or resignation. Committee Report, pp. 9, 17-18, 57-59.

If the Council elects to submit the Committee's proposed sections to the voters for approval, it may wish to consider providing the City Auditor with similar investigatory authority to that provided to the CFO. This could mirror language found in Charter section 82 (Examination and Investigation of Claims by the Auditor and Comptroller). Section 82 authorizes the Auditor and Comptroller to: "investigate a claim and for that purpose may summon before him any officer, agent or employee of the City, any claimant or other person, and examine him upon oath or affirmation relative thereto . . ." Proposed section 39.2 gives the City Auditor access to all City records and requires City Officers, agents and employees to "cooperate" (presumably with the City Auditor). It does not provide separate authority to the City Auditor to actually investigate, a function ordinarily assumed by a City Auditor.

The Council could accomplish this by adding such authority to section 39.2, and inserting a missing phrase as follows:

The City Auditor shall have access to, and authority to examine any and all records, documents, systems and files of the City and/or other property of any City department, office or agency, whether created by the Charter or otherwise. It is the duty of any officer, employee or agent of the City having control of such records to permit access to, and examination thereof, upon the request of the City Auditor or his or her authorized representative. It is also the duty of any such officer, employee or agent to fully cooperate with the City Auditor, and to make full disclosure of all pertinent information. The City Auditor may investigate any material claim of financial fraud, waste or impropriety within any City Department and for that purpose may summon any officer, agent or employee of the City, any claimant or other person, and examine him or her upon oath or affirmation relative thereto.

In addition, the Council may wish to consider deleting or revising other language in these sections that is legally irrelevant. For example, proposed section 39.2, related to the City Auditor, provides at the end of the first paragraph: "Nothing herein prevents the Council or the Audit Committee from meeting in closed session to discuss matters that are required by law to be discussed in closed session pursuant to State law." Presumably this sentence refers to provisions of the Ralph M. Brown Act. The Act's provisions have long been held to be matters of statewide concern, making them applicable to all City entities that meet the Act's requirements, regardless whether it is expressly incorporated by local laws. *San Diego Union v. City Council*, 146 Cal. App. 3d 947, 958 (1983). It is unclear why this provision is incorporated into the section that creates the office of City Auditor. Generally speaking, the Act's provisions would not apply to meetings the City Auditor holds. However, they would apply to meetings of the Audit Committee, created by Charter section 39.1. Moreover, it is misleading to suggest the Act *requires* closed sessions. The Act *permits* closed sessions under certain limited circumstances. We recommend deletion of this sentence from proposed section 39.2 before it is submitted to the voters.

Sections 39.2 and 111, like section 39.1, each also provide: "This section shall not be subject to the provisions of section 11.1." The proposed sections do not appear to involve setting compensation, enacting legislation, or setting City policy. Thus, they need not be exempted from section 11.1. We also recommend deletion of this sentence from these sections.

## **8. Balanced Budget**

The Committee proposes that Charter section 69 (Fiscal Year and Manager's Estimate) be amended to expressly provide the City adopt a balanced budget. It defines a balanced budget to mean "there is available funding from all sources sufficient to cover projected expenditures for said fiscal year." It adds a new paragraph to section 69, requiring the City Manager to monitor the budget during the year and to provide the City Council with proposed revisions to the budget, setting a 60-day timeline for the City Council to adopt the revisions. It requires the City budget to be posted in electronic media on the internet. Committee Report, pp. 9, 18-19, 60-61.

We raise the following issues:

- If this proposed change is to be submitted to the voters, this Office recommends it be submitted as a separate measure for voter determination from any of the other proposed changes pursuant to the Separate Vote Rule. See City Att'y Report No. 2007-17 (Nov. 2, 2007). The subject matter of this change does not appear "reasonably germane" to other Committee-proposed changes.
- The proposed language of the full new paragraph in the section is ambiguous and could be problematic without clarification. The full new paragraph added to section 69 provides in part: "No longer than 60 days from the date of submittal by the City Manager of said revised budget, the City Council shall adopt the proposed revisions or offer alternative

revisions to ensure the budget is balanced." The word "shall" implies the Council *must* accept the revisions proposed by the Manager and may only "offer" proposed alternatives. It does not expressly provide the City Council with the authority to *adopt* its offered alternatives. If the Council wishes to forward this proposal to the voters it may wish to consider the following corrective language: "... the City Council shall adopt the proposed revisions or ~~offer~~ its alternative revisions ~~that~~ to ensure the budget is balanced."

- It is unclear whether the proposed new paragraph was intended to apply to every proposed modification of the budget, or only to major budget revisions that might impact a number of departments, such as a mid-year adjustment. Because the section uses words such as "revisions to the budget" and "revised budget," we assume the intent of this new paragraph is to encompass significant budget revisions arising out of insufficient funding for the City's operations.
- The use of the word "budget" in the proposed new paragraph also implies the proposed revisions would be subject to the "back and forth" provisions of the special veto process described in Charter section 290(b), for so long as Article XV is effective.
- Last, the final new sentence of section 69 requires the "budget" to be posted electronically. It is not clear whether revisions to the budget must also be posted electronically. If desired, the following phrase could be added to the last sentence as follows: "The City shall post copies of the budget and any revisions on appropriate electronic media, such as the internet, to allow the public full access to the document."

## DUTIES OF ELECTED OFFICIALS

### 9. Managed Competition

Section 117(c) was added to the City Charter by passage of Proposition C at a special election in November 2006. It permits the City to contract with independent vendors to provide certain City services now performed by classified employees, a process called "Managed Competition." In October 2006, the Mayor and City Council adopted a resolution of intent that City services provided by members of the public safety retirement system (police, fire, and lifeguard) would not be subject to Managed Competition, if Proposition C was passed by the voters. The resolution directed the City Attorney to incorporate language providing this protection in any implementing ordinances should the measure pass. *See* R-301949 (Oct. 9, 2006). After it passed, the Council adopted an implementing ordinance (O-19566, January 9, 2007) providing in part that "Police Officers, Fire Fighters and Lifeguards who participate in the Safety Retirement System will not be subject to Managed Competition." SDMC §22.3702(b).

The Committee proposes Charter section 117 be amended to add a new subsection (d) that would help ensure services provided by City safety employees are not subject to the Managed Competition process. The proposed subsection mirrors Municipal Code section

22.3702(b) and provides: "(d) Police officers, firefighters and lifeguards who participate in the Safety Retirement System shall not be subject to Managed Competition." Committee Report, pp. 9, 19-20 and 62-63.

The Council may wish to consider the following:

- The "safety" employees are currently protected under the San Diego Municipal Code. There is no legal need to seek a Charter change.
- The subject of this proposal is unrelated to the sunset of Article XV and may be presented to the voters at any election. However, its subject matter is not "reasonably germane" to any of the other proposed Committee changes. Accordingly, if presented to the voters, it must be as a separate proposition as required by the Separate Vote rule.
- This Office needs to further review whether this proposal would be subject to a "meet and confer" requirement.

#### 10. Modification of Section 40

Existing Charter section 40 (City Attorney) sets forth the duties and responsibilities of the City Attorney. The Committee report proposes that section 40 be completely rewritten. The arguments made to support the proposal are in the Committee's report at pages 20-21. A strong minority of the Committee objected.<sup>7</sup> See, minority report at Appendix III, pp. 6-7. See also Committee Report, pp. 9 and 64-69.

The Committee contends that the language in Charter section 40 is ambiguous. This contention is curious in light of the fact that the section has been in effect for decades without questions or concerns about the wording. Moreover, the proposed language is ambiguous in many respects. For example, what precisely *are* the "matters over which the Charter gives the Mayor responsibility," especially if the Mayor-Council form of government ceases to exist?

One of the most serious legal concerns is that the amendment presupposes that Article XV has been made permanent, by incorporating language implying the Mayor has powers separate from the City Council, and has veto power over Council actions. For example, the new subsections on "Control of Litigation" and "Settlement of Litigation" provide the following: "... In the course of litigation, client decisions, including a decision to initiate litigation, shall be made by the *Mayor or* the Council in accordance with this section . . ."; "The *Mayor* shall make client decisions in litigation involving matters over which the Charter gives the Mayor responsibility;" "The *Mayor and Council* shall establish by ordinance a process for the approval or rejection of settlement involving money damages;" and "The Council shall have the authority to approve or reject settlement of litigation that does not involve only the payment or receipt of

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<sup>7</sup> The vote was 9 in favor and 5 against, with one Committee member absent.

money, *subject to veto of the Mayor, and Council override of the Mayor's veto*, as provided under this Charter." (emphasis added.) But, the permanency of Article XV has yet to be decided. If Article XV sunsets, these changes would make no legal sense with a Mayor acting only as part of the City Council.

Finally, this subject is not "reasonably germane" to any of the other proposed Committee changes. Accordingly, if presented to the voters, it would need to be presented as a separate proposition as required by the Separate Vote rule.

## 11. Salary Setting for Elected Officials

The Charter currently provides that the salaries for Councilmembers and Mayor be set by ordinance of the City Council, requiring the Council to vote on its own salaries after consideration of the recommendation of a 7-member Salary Setting Commission, appointed by the Civil Service Commission. The ordinance setting Council salaries is expressly made subject to referendum. Charter §§ 12.1 (Councilmanic Salaries), 24.1 (Mayor's Salary), and 41.1 (Salary Setting Commission). The salary of the City Attorney is set by the City Council and made part of the Appropriation Ordinance. Charter § 40 (City Attorney).

In general, the Committee's proposal requires the Salary Setting Commission to *recommend to the Mayor and Council the salaries of all City elected officials every two years. It requires the Council to adopt an ordinance setting those salaries, with such ordinance to be subject to referendum and exempt from any Mayoral veto.* The amendments to Charter section 41.1 (Salary Setting Commission) are patterned after Article III, section 8 of the California constitution. Section 41.1 revisions also set minimum eligibility requirements for Commission members and guidelines for them to consider in establishing these salaries. Committee Report pp. 9, 21-22 and 70-73.

If the Council desires to submit these suggested changes to the voters, the Council may wish to consider the following points first.

- The proposed change to section 12.1 contains phrasing that connects it to Article XV, which may or may not become permanent. The new language provides: "The ordinance adopting the salaries of elected officials shall be separate from the City's Salary Ordinance and shall not be subject to any veto provision of Article XV." If the goal is to exempt this ordinance from a Mayoral veto for the duration of Article XV, it would be better to delete the phrase "and shall not be subject to any veto provision of Article XV." Instead an amendment to Charter section 280 (Approval or Veto of Council Actions by Mayor) could be included with this series of changes that would provide a new subsection as follows "(a). . . (6) The ordinance setting the salaries of elected officials in accordance with section 12.1."

- The changes suggested in this item are germane to each other, but are not reasonably germane to any of the other proposed measures related to the Mayor-Council form of government. Thus, they should be submitted to the voters for a separate vote from other suggested measures.

### CONCLUSION

The Charter Review Commission considered a broad range of issues over a relatively short period of time. Many of the recommendations were adopted by the Committee at a single meeting and without sufficient public input and scrutiny. We urge the Council not to do the same. Charter amendments must not be hastily submitted to the voters. There are many important issues facing the City, especially as they relate to the City's financial structure and oversight. Important questions have not been fully discussed, such as whether the City Auditor should be elected, rather than appointed. There has also been much disagreement over the composition of the Audit Committee. These are important issues that should be fully vetted so that the best proposals can be put to the voters. Further, we note that some of these issues do not require a Charter amendment and may be addressed through ordinances adopted by the City Council, as occurred with the creation of the Audit Committee and clarification of the exemption of safety members from Managed Competition. This Office will provide additional analysis and advice as the City proceeds to review these and other proposed Charter amendments.

Respectfully submitted,



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RC-2008-1

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Michael J. Aguirre  
CITY ATTORNEY

November 2, 2007

REPORT TO THE COMMITTEE ON RULES, FINANCE  
AND INTERGOVERNMENTAL RELATIONS

CITY BALLOT MEASURES SUBMITTED TO VOTERS ARE SUBJECT TO THE  
SEPARATE VOTE (SINGLE SUBJECT) RULE

INTRODUCTION

The San Diego City Council Rules, Open Government, and Intergovernmental Relations Committee is scheduled to consider the final report of the 2007 San Diego Charter Review Committee, issued on October 4, 2007 [CRC Report]. The report proposes that the City Council submit a series of amendments to the voters during 2008. CRC Report at 8-9. The report broadly separates the changes into three major groups: interim strong mayor and legislative tightening; financial reform and the Kroll report; and duties of elected officials. This Office anticipates the Committee and the Council may request advice on whether these measures may be combined in a single ballot measure. This Report discusses the requirement that each measure submitted to voters address only a single subject so that each subject may be voted on separately.

DISCUSSION

I. The Separate Vote and Single Subject Rules.

The separate vote rule is expressed in the last sentence of Article XVIII, section 1 of the California constitution, which provides: "Each amendment [to the state constitution] shall be so prepared and submitted that it can be voted on separately." Although this provision has existed in one form or another in the state constitution since 1879,<sup>1</sup> it was only in 2006 that the California Supreme Court interpreted its scope and construction. In *Californians for an Open Primary v. McPherson*, 38 Cal. 4th 735 (2006) [McPherson], the court decided the separate vote rule limited the authority of the state legislature to package disparate proposed constitutional amendments in a single measure, and that it should be construed consistently with single subject rule, a kindred provision governing voter-originated constitutional initiatives under Article II, section 8(d) of the constitution. *Id.* at 738.

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<sup>1</sup> The 1879 version provided: "Should more than one amendment be submitted at the same election, they shall be so prepared and distinguished, by numbers or otherwise, that each can be voted on separately." *Id.* at 747.



Both the separate vote rule and the single subject rule serve the same purpose—to bar submission of measures that “might cause voter confusion or might constitute ‘logrolling’- that is, the practice of combining two or more unrelated provisions in one measure, thereby forcing a single take-it-or-leave-it vote on matters that properly should be voted upon separately.” *Id.* at 749 (citations omitted) and 765-766. The goal in classic logrolling is to bundle a provision attractive to the voters with one that is less attractive, “simply to increase the likelihood that the proponent’s desired proposal will be adopted.” *Senate of the State of Cal. v. Jones*, 21 Cal. 4th 1142, 1151 (1999).

## **II. Charter Measures Submitted by the City Council to the Voters Are Subject to the Separate Vote (Single Subject) Rule.**

Courts have not yet determined that the separate vote rule of the California Constitution is a matter of statewide concern, applicable to the submission of charter amendments to city voters by their legislative bodies. In San Diego’s case, the wait for such decision is unnecessary because the Charter requires the City Council to comply with the separate vote rule in submitting charter amendments to the voters.

Charter section 223 was adopted with the 1931 City Charter. It provides the Charter “be amended in accordance with the provisions of Section Eight, Article Eleven, of the Constitution of the State of California, or any amendment thereof or provision substituted therefor in the State Constitution.” The 1931 version of Article XI, section 8 of the California Constitution, incorporated by section 223 of the City Charter, permitted city legislative bodies to submit multiple proposals to amend a City charter that were “. . . to be voted upon by the electors separately. . . .” Former Cal. Const. Art XI § 8 (Cal. Stats. 1931).<sup>2</sup>

The virtually identical language of these provisions indicates the intent to incorporate the separate vote rule from the California constitution into the City Charter, making it applicable to charter amendments submitted by the City Council to the voters. This interpretation is also consistent with Charter section 275(b) that requires City ordinances: “. . . shall be confined to one subject, and the subject or subjects of all ordinances shall be clearly expressed in the title,”<sup>3</sup> and section 27.0503 of the San Diego Municipal Code, requiring the City Council to “decide by ordinance the content of the ballot question for each ballot measure. . . .”

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<sup>2</sup> The full sentence in former Article XI, section 8 refers both to amendments proposed by the legislative body and the electors. It provides: “In submitting any such charter or amendment separate provisions, whether alternative or conflicting, or one included in the other, may be submitted at the same time *to be voted on by the electors separately*, and, as between those so related, if more than one receive a majority of votes, the proposition receiving the larger number of votes shall control as to all matters in conflict.”

<sup>3</sup> Superseded Charter section 16 also provides: “All ordinances . . . shall be confined to one subject, and the subject or subjects of all ordinances shall be clearly expressed in the title.”

### III. The "Reasonably Germane" Test.

The test of whether a particular measure submitted to the voters meets or violates the separate vote rule is the same test used to determine a violation of the single subject rule. *McPherson*, 38 Cal. 4th at 763. The court construes both in an "accommodating and lenient manner so as not to unduly restrict the Legislature's or the people's right to package provisions in a single bill or initiative." *Id.* at 764.

The court has "found the single subject rules to have been satisfied so long as challenged provisions meet the test of being reasonably germane to a common theme, purpose, or subject." *Ibid.* The court went on to note that, "[i]n setting forth the 'reasonably germane' test, several of our prior decisions have stated or repeated language suggesting the standard requires that each of a measure's parts be reasonably germane *to one another* as well as reasonably germane *to a common theme, purpose, or subject*. . . . In *applying* the reasonably germane test, however, our decisions uniformly have considered only whether each of the parts of a measure is reasonably germane to a common theme, purpose, or subject, and have not *separately* or *additionally* required that each part also be reasonably germane to one another." *Id.* at 764 n. 29. (citations omitted, emphasis in original.)

Examples of measures that have and have not met this test include:

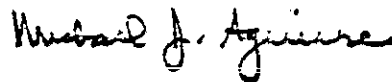
- In *McPherson*, the California Supreme Court held a two-part legislatively sponsored measure violated the separate vote rule because each part was not reasonably germane to the other. *McPherson*, 38 Cal. 4th at 779. One part of the measure proposed a constitutional amendment to require that a political party's top vote-getter in a primary election be permitted to run in the following general election. The second part proposed a constitutional amendment to provide a new means for the state to pay bond obligations. *Id.* at 739. The scheme was described as "classic logrolling." *McPherson*, 38 Cal. 4th at 791 (*Moreno, J., concurring*).
- The California Supreme Court upheld Proposition 8, known as the Victims' Bill of Rights, against a single-subject challenge. The Court held each of its several facets was reasonably germane to the general subject of promoting the rights of actual or potential crime victims. The court also cautioned that initiative proponents did not have a blank check to draft measures containing unduly diverse or extensive provisions bearing no reasonable relationship to each other or a general object. *Brosnahan v. Brown*, 32 Cal. 3d 236, 246-253 (1982).
- A trailer bill that amended, repealed or added approximately 150 sections to over 20 codes had as its single subject "fiscal affairs" or "statutory adjustments" and was too broad to comply. *Harbor v. Deukmejian*, 43 Cal. 3d 1078, 1100-1101 (1987).

- A proposed initiative to restrict legislative salaries and transfer reapportionment from the Legislature to the Supreme Court could not be upheld under the general subject of voter involvement or voter approval of political issues. *Senate of the State of Cal.*, 21 Cal. 4th at 1162-1163.

### CONCLUSION

Our Office will provide advice as to whether any proposed measure might meet the separate vote test when the Council decides which proposed charter amendments should go to the voters. This Office recommends the Committee and Council keep in mind the purpose behind the separate vote rule, namely, to prevent voter confusion and to avoid "logrolling," when considering whether certain measures should be considered separately or together by the voters.

Respectfully submitted,



MICHAEL J. AGUIRRE  
City Attorney

JAK:als  
RC-2007-17

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# REQUEST FOR COUNCIL ACTION

## CITY OF SAN DIEGO

1. CERTIFICATE NUMBER  
(FOR AUDITOR'S USE ONLY) 2/4

TO: CITY ATTORNEY	2. FROM (ORIGINATING DEPARTMENT): CITY ATTORNEY	3. DATE: January 25, 2008
4. SUBJECT: Submitting to the voters a ballot proposition amending the City Charter to make the Strong Mayor form of government permanent, add a ninth Council district, and increase the number of Council votes necessary to override a Mayoral veto		
5. PRIMARY CONTACT (NAME, PHONE, & MAIL STA.) Cathy Bradley, Chief Deputy City Attorney 236-6220 M.S. 59	6. SECONDARY CONTACT (NAME, PHONE, & MAIL STA.) Sharon Spivak, Deputy City Attorney 236-6220 M.S. 59	7. CHECK BOX IF REPORT TO COUNCIL IS ATTACHED <input type="checkbox"/>

## 8. COMPLETE FOR ACCOUNTING PURPOSES

FUND					9. ADDITIONAL INFORMATION / ESTIMATED COST:
DEPT.					
ORGANIZATION					
OBJECT ACCOUNT					
JOB ORDER					
C.I.P. NUMBER					
AMOUNT					

## 10. ROUTING AND APPROVALS

ROUTE (#)	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED	ROUTE (#)	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED
1	ORIG. DEPT	<i>[Signature]</i>	1/25/08	8	DEPUTY CHIEF		
2				9	COO		
3				10	CITY ATTORNEY	<i>[Signature]</i>	1/25/08
4	LIAISON OFFICE			11	ORIG. DEPT	<i>[Signature]</i>	1/25/08
5				DOCKET COORD: _____ COUNCIL LIAISON _____			
6				<input checked="" type="checkbox"/> COUNCIL PRESIDENT <input type="checkbox"/> SPOB <input type="checkbox"/> CONSENT <input type="checkbox"/> ADOPTION			
7				<input type="checkbox"/> REFER TO: _____ COUNCIL DATE: _____			

11. PREPARATION OF: ☒ RESOLUTIONS ☒ ORDINANCE(S) ☐ AGREEMENT(S) ☐ DEED(S)

1. Submitting to the qualified voters of the City of San Diego at the Municipal Election consolidated with the Statewide Primary Election to be held on June 3, 2008, one proposition amending the City Charter by amending Article XV, section 255 to require the Council to place on the June 2010 ballot Charter amendments related to making the Strong Mayor form of government permanent, adding a ninth Council district, and increasing the number of Council votes necessary to override a Mayoral veto.

2. Directing the City Attorney to prepare a ballot title and summary. 3. Directing the City Attorney to prepare an impartial analysis.  
4. Directing the Mayor's Office to prepare a fiscal analysis. 5. Assigning authorship of the ballot argument.

11A. STAFF RECOMMENDATIONS:

## 12. SPECIAL CONDITIONS (REFER TO A.R. 3.20 FOR INFORMATION ON COMPLETING THIS SECTION.)

COUNCIL DISTRICT(S): N/A  
 COMMUNITY AREA(S): N/A  
 ENVIRONMENTAL IMPACT: This action is not a "project" for purposes of CEQA.  
 HOUSING IMPACT: N/A  
 OTHER ISSUES:

000121

EXECUTIVE SUMMARY SHEET

DATE REPORT ISSUED:

REPORT NO.:

ATTENTION: City Council

ORIGINATING DEPARTMENT: City Clerk

SUBJECT: MUNICIPAL SPECIAL ELECTION: JUNE 3, 2008

COUNCIL DISTRICT(S): ALL

STAFF CONTACT: Denise Jenkins, (619) 533-4030

REQUESTED ACTION: Resolution

STAFF RECOMMENDATION:

Pass Resolution

EXECUTIVE SUMMARY:

Introduce and adopt the resolution and ordinance in Subitem A; consider discretionary actions in Subitems B, C, D and E:

Subitem-A: (O-####-##)

Introduction and adoption of an Ordinance submitting to the qualified voters of the City of San Diego at the Special Municipal Election consolidated with the California State Primary Election to be held on June 3, 2008, one proposition relating to a Charter amendment to provide for mandatory recycling.

Subitem-B

Directing the City Attorney to prepare a ballot title and summary.

Subitem-C

Directing the City Attorney to prepare an impartial analysis.

Subitem-D

Directing the Mayor's Office to prepare a fiscal analysis.

Subitem-E

Assigning authorship of the ballot argument.

FISCAL CONSIDERATIONS:

PREVIOUS COUNCIL and/or COMMITTEE ACTION: Rules Committee January 23, 2008 forwarded item to full Council.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS: N/A

KEY STAKEHOLDERS & PROJECTED IMPACTS (if applicable): N/A

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Elizabeth Maland  
City Clerk

ORDINANCE NUMBER O-\_\_\_\_\_ (NEW SERIES)

DATE OF FINAL PASSAGE \_\_\_\_\_

AN ORDINANCE SUBMITTING TO THE QUALIFIED  
VOTERS OF THE CITY OF SAN DIEGO AT THE MUNICIPAL  
ELECTION CONSOLIDATED WITH THE STATEWIDE  
PRIMARY ELECTION TO BE HELD ON JUNE 3, 2008, ONE  
PROPOSITION AMENDING THE CITY CHARTER BY  
AMENDING ARTICLE XV, SECTION 255 TO REQUIRE THE  
COUNCIL TO PLACE ON THE JUNE 2010 BALLOT  
CHARTER AMENDMENTS RELATED TO MAKING THE  
STRONG MAYOR FORM OF GOVERNMENT PERMANENT.

WHEREAS, pursuant to California Constitution, article XI, section 3(b), California  
Elections Code section 9255(a)(2), and San Diego City Charter section 223, the City Council has  
authority to place Charter amendments on the ballot to be considered at a Municipal Election;  
and

WHEREAS, by Ordinance No. O-\_\_\_\_\_, adopted on \_\_\_\_\_, 2008, the  
Council of the City of San Diego is calling a Municipal Election to be consolidated with the  
Statewide Primary Election on June 3, 2008, for the purpose of submitting to the qualified voters  
of the City one or more ballot propositions; and

WHEREAS, the City Council desires to submit to the voters at the Municipal Election  
one proposition amending the Charter of the City of San Diego by amending Article XV, section  
255, to require the Council to place a measure on the ballot in June 2010 to consider making  
permanent the strong mayor form of government; increasing the number of Council districts  
from eight to nine; and increasing the number of Council votes required to override a Mayoral  
veto; and

WHEREAS, the City Council's proposal, on its own motion, of a charter amendment is governed by California Constitution, article XI, section 3(b), California Elections Code section 9255(a)(2), and California Government Code section 34458, and is not subject to veto by the Mayor; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That one proposition amending the City Charter by amending Article XV, section 255, is hereby submitted to the qualified voters at the Municipal Election to be held on June 3, 2008, with the proposition to read as follows:

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### PROPOSITION

#### **Section 255: Operative Date; Sunset of Article; Future Action by Voters**

- (a) The date for the provisions of this Article to become operative is January 1, 2006.
- (b) After January 1, 2006, the provisions of this Article shall remain in effect for a period of five years (until December 31, 2010) at which time this Article shall be automatically repealed and removed from the Charter. However, the Council and the people reserve the right to propose amendments to the Charter at the November 2010 election or sooner to extend, make permanent, shorten or repeal the effective period of this Article and to consider increasing the number of Council districts to nine at the time of the next City Council district reapportionment which follows the national decennial census in 2010.
- (c) To ensure the people have an opportunity to consider the permanency of this Article before it is automatically repealed, at the June 2010 election, the City Council shall place a measure on the ballot to propose amendments to the Charter to make this Article permanent on January 1, 2011; increase the number of Council districts to nine at the time of the next City Council district

reapportionment which follows the national decennial census in 2010; and increase the number of Council votes required to override a mayoral veto of an ordinance or resolution to a two-thirds majority of the Council, with such increase to take effect at such time a ninth Council member is elected and qualified.

### END OF PROPOSITION

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Section 2. The proposition shall be presented and printed upon the ballot and submitted to the voters in the manner and form set out in Section 3 of this ordinance.

Section 3. On the ballot to be used at this Municipal Election, in addition to any other matters required by law, there shall be printed substantially the following:

<b>PROPOSITION _____. AMENDS CHARTER TO REQUIRE COUNCIL TO SUBMIT CHARTER AMENDMENTS TO VOTERS AT JUNE 2010 ELECTION RELATING TO STRONG MAYOR FORM OF GOVERNANCE.</b> Shall the Charter be amended to require the City Council to submit to voters at the June 2010 election Charter amendments making the Strong Mayor form of government permanent; adding a Council seat; and, when the ninth seat is filled, increasing the Council votes required to override a mayoral veto?	YES	
	NO	

Section 4. An appropriate mark placed in the voting square after the word "Yes" shall be counted in favor of the adoption of this proposition. An appropriate mark placed in the voting square after the word "No" shall be counted against the adoption of the proposition.

Section 5. Passage of this proposition requires the affirmative vote of a majority of those qualified electors voting on the matter at the Municipal Election.


Section 6. The City Clerk shall cause this ordinance or a digest of this ordinance to be published once in the official newspaper following this ordinance's adoption by the City Council.



Section 7. Pursuant to San Diego Municipal Code section 27.0402, this measure will be available for public examination for no fewer than ten calendar days prior to being submitted for printing in the sample ballot. During the examination period, any voter registered in the City may seek a writ of mandate or an injunction requiring any or all of the measure to be amended or deleted. The examination period will end on the day that is 75 days prior to the date set for the election. The Clerk shall post notice of the specific dates that the examination period will run.

Section 8. Pursuant to sections 295(b) and 295(d) of the Charter of the City of San Diego, this ordinance shall take effect on the date of passage by the City Council, which is deemed the date of its final passage.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By   
Catherine Bradley  
Chief Deputy City Attorney

CMB:SBS:als  
1/24/08  
2/1/08 (Cor. Copy)  
Or.Dept:CityAtty  
O-2008-93

RESOLUTION NUMBER R-\_\_\_\_\_

DATE OF FINAL PASSAGE \_\_\_\_\_

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN DIEGO DIRECTING THE CITY ATTORNEY TO PREPARE A BALLOT TITLE, SUMMARY, AND IMPARTIAL ANALYSIS; DIRECTING THE MAYOR TO PREPARE A FISCAL ANALYSIS; AND ASSIGNING AUTHORSHIP OF THE BALLOT ARGUMENT; ALL REGARDING THE BALLOT MEASURE TO REQUIRE THE COUNCIL TO PLACE ON THE JUNE 2010 BALLOT CHARTER AMENDMENTS RELATED TO MAKING THE STRONG MAYOR FORM OF GOVERNMENT PERMANENT, ADDING A NINTH COUNCIL DISTRICT, AND INCREASING THE NUMBER OF COUNCIL VOTES NECESSARY TO OVERRIDE A MAYORAL VETO.

WHEREAS, San Diego Municipal Code section 27.0504 allows the City Council to direct the City Attorney to prepare a ballot title and summary of any proposed ballot measure; and

WHEREAS, San Diego Municipal Code section 27.0505 allows the City Council to direct the City Attorney to prepare an impartial analysis of any proposed ballot measure; and

WHEREAS, San Diego Municipal Code section 27.0506 allows the City Council to direct the City Manager (Mayor under the current Council-Mayor form of government) to prepare a fiscal impact analysis of any proposed legislative act; and

WHEREAS, San Diego Municipal Code section 27.0513 allows the City Council to assign authorship and signing of the ballot argument to itself, individual Councilmembers, and the Mayor; and

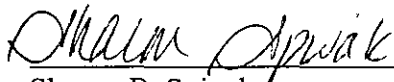
WHEREAS, at a meeting held on February 4, 2008, the City Council adopted Ordinance No. O-\_\_\_\_\_ (N.S.), to place on the June 3, 2008 ballot the ballot measure to require the Council to place a measure on the June 2010 ballot to consider making permanent the Strong

Mayor Form of Government; increasing the number of Council districts from eight to nine; and increasing the number of Council votes necessary to override a Mayoral veto; NOW, THEREFORE,

BE IT RESOLVED, by the Council of the City of San Diego, as follows:

1. That the City Attorney is directed to prepare a ballot title and summary of the proposed ballot measure for inclusion in the voter pamphlet and to deliver the ballot title and summary to the Office of the City Clerk, Elections Section, no later than March 17, 2008.
2. That the City Attorney is directed to prepare an impartial analysis of the proposed ballot measure for inclusion in the voter pamphlet and to deliver said analysis to the Office of the City Clerk, Elections Section, no later than March 17, 2008.
3. That the Mayor is directed to prepare a fiscal impact analysis of the proposed ballot measure for inclusion in the voter pamphlet and to deliver said analysis to the Office of the City Clerk, Elections Section, no later than March 17, 2008.
4. That \_\_\_\_\_ is authorized to sign and file a written argument in support of the ballot measure for inclusion in the voter pamphlet and to deliver said argument to the Office of the City Clerk, Elections Section, no later than March 17, 2008.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By   
Sharon B. Spivak  
Deputy City Attorney

CMB:SBS:als  
01/29/08  
Or.Dept:CityAtty  
R-2008-628

I hereby certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of \_\_\_\_\_.

ELIZABETH S. MALAND  
City Clerk

By \_\_\_\_\_  
Deputy City Clerk

Approved: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor

Vetoed: \_\_\_\_\_  
(date)

\_\_\_\_\_  
JERRY SANDERS, Mayor